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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHAZZ ANDRE JACKSON, Defendant and Appellant.	G055383 (Super. Ct. No. 15NF1178) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Richard M. King, and Sheila F. Hanson, Judges. Judgment conditionally reversed and remanded with directions. Respondent's application for the disclosure of sealed records is denied.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Chazz Andre Jackson guilty of forcible rape and related crimes: pimping, pandering, human trafficking, human trafficking of a minor, witness intimidation, and attempted criminal threats. The trial court found true four out-of-state prior serious felony convictions and imposed a lengthy prison sentence.

The trial court had dismissed the same action in two prior superior court cases. On appeal, Jackson claims that this third case violates the so-called "two dismissal" rule. (Pen. Code, § 1387, subd. (a).)[1] We disagree. There is a "[g]ood cause" exception that applies under the circumstances. (§ 1387, subd. (c)(1).)

Prior to trial, Jackson sent a letter to the superior court asking the court to replace his appointed attorney. The court said the letter was "an ex parte communication, which the court will not entertain." Jackson claims that the court's ruling was in error. We agree. The court was required to conduct a *Marsden* hearing.[2]

After trial, the court ruled that the alleged out-of-state prior convictions qualify as serious felonies under California law (three counts of robbery and one count of attempted carjacking). Jackson argues that the court erred. We agree. There is insufficient evidence to support the robbery prior convictions. Jackson also argues that due to a recent statutory change, the court can retroactively exercise its discretion on remand to strike the punishment for prior serious felony convictions. We agree.

We are conditionally reversing the jury's guilty verdicts. The trial court shall conduct a *Marsden* hearing on remand. If the court decides it would have granted the motion, then the court is to appoint a new attorney and the prosecution may retry the case. But if the court decides it would not have appointed a new attorney, then the conditional reversals are to be reinstated; the court shall then resentence Jackson within its discretion, and consistent with our rulings regarding Jackson's prior convictions.

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[1] All further undesignated statutory references will be to the Penal Code.

[2] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

I

FACTS AND PROCEDURAL BACKGROUND

Kelli worked as a prostitute throughout Southern California, sometimes in Orange County. Jackson placed illicit advertisements online; Kelli had sex with the men who responded to the ads and gave Jackson the money. Jackson forced Kelli to have sex with him 10 to 15 times. Erica, Indigo, Ryann, and Sabrina also worked as prostitutes for Jackson. Sabrina began working for Jackson when she was 17 years old. When they first met, Jackson held her down and forced her to have sex with him. When Sabrina visited Jackson in jail he told her not to cooperate with police, and not to testify as a witness against him.[3]

The jury found Jackson guilty of 17 crimes: five counts of pimping, five counts of pandering, three counts of forcible rape, one count of human trafficking, one count of human trafficking of a minor, one count of attempting to dissuade a witness, and one count of attempted criminal threats. The jury found true a multiple victim allegation. The jury also found true an allegation that the trafficking of a minor crime was committed under aggravated circumstances (either force, fear, fraud, deceit, etc.).

The trial court found true four out-of-state prior convictions and found them to be serious felonies under California law. After dismissing further alleged prison and "strike" priors, the court imposed a determinate term of 54 years, followed by an indeterminate term of 45 years to life.[4]

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[3] Jackson is not challenging the sufficiency of the evidence; therefore, we need only briefly summarize the facts, construing them "'in the light most favorable to the judgment.'" *(People v. Curl* (2009) 46 Cal.4th 339, 342, fn. 3.)

[4] The prior convictions and sentence will be reviewed in greater detail in the discussion section of this opinion.

II

DISCUSSION

Jackson contends the trial court: (A) erred in interpreting the statutory "two dismissal" rule; (B) erred by failing to hold a *Marsden* hearing; (C) erred by ruling that his out-of-state prior convictions qualify as serious felonies; and (D) may now exercise its discretion on remand to strike the punishment for his prior serious felony convictions.

A. The "Two Dismissal" Rule

Jackson contends "[t]he present action is barred by section 1387 because the action had previously been dismissed twice and no statutory exception to the two dismissal rule applied." (Original capitalization and boldfacing omitted.) We disagree.

1. The First Dismissal

On September 10, 2014, the prosecution filed a felony complaint (case No. 14NF3773). The complaint charged Jackson with the crimes of human trafficking, pimping, pandering, and forcible rape as to Kelli; the complaint further alleged pimping and pandering crimes as to Sabrina. After a preliminary hearing, the prosecution filed the same charges in an information. On the statutory last day for trial, the prosecution told the court that it was unable to proceed. The court did not find "good cause" to continue the jury trial and dismissed the case.

2. The Second Dismissal

On February 25, 2015, the prosecution filed a second felony complaint (case No. 15NF0507). The complaint generally charged the same crimes alleged in the prior case, along with an additional count of criminal threats, and further pimping and pandering crimes as to Erica, Indigo, and Ryann.

On April 24, 2015, the case was set for a preliminary hearing. The prosecution announced that it was ready to proceed. Jackson's counsel told the court he was in trial elsewhere and asked the court to continue the preliminary hearing to May 1, 2015. Jackson objected and said: "I would like to exercise my *Farretta* rights."[5] The court overruled the *Farretta* motion. Jackson told the court twice: "That's past 60."[6] The court told Jackson that it is "going to find good cause to continue [to May 1, 2015] over your objection." Jackson repeatedly objected. The court ordered the bailiff to: "Take him downstairs. Take him downstairs." Jackson said: "This is bullsh*t, man."

On May 1, 2015, Jackson moved to dismiss based on a violation of his right to have his preliminary hearing occur within 60 days of arraignment. The court granted the motion and dismissed the case.

3. The Instant Case

On May 1, 2015, the prosecution filed a third felony complaint (case No. 15NF1178). The complaint charged Jackson with the same crimes alleged in the prior case. The prosecution later filed an information that added additional counts related to Sabrina. Jackson filed a motion to dismiss under section 1387 (the "two dismissal" rule). The court denied the motion "because the prosecution did announce ready at the second dismissal and the court found good cause. And under 1387 of the Penal Code that appears to the court in a plain reading of the statute to give the prosecution the right to file this particular case."

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[5] *Farretta v. California* (1975) 422 U.S. 806 (*Farretta*).

[6] "The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment . . . unless the defendant personally waives his or her right . . . ." (§ 859b.)

4. Legal Principles

"Section 859b governs the timing of a defendant's preliminary hearing and establishes the statutory right, . . . to a preliminary hearing at the earliest possible time." (*Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 727-728 (*Ramos*).) As relevant here, the statute creates "an outside limit on when the preliminary hearing may be held, the 60-day rule . . . , and establishes the consequence of dismissal when the hearing is set or continued beyond the 60–day period: 'The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment . . . , unless the defendant personally waives his . . . right to a preliminary examination within 60 days.' (§ 859b, subd. (b).)" (*Id*. at p. 728, fn. omitted.)

Section 1387, referred to as the "two dismissal" rule, generally permits a felony charge to be dismissed and refiled once, but no more than that (prior to jeopardy attaching). "An order terminating an action pursuant to this chapter, or Section 859b . . . is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter, or Section 859b . . . ." (§ 1387, subd. (a).) Section 1387 "provides a procedural safeguard against multiple prosecutions for the same offense." (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 747.)

However, where an action is dismissed for continuing the preliminary hearing in violation of the 60-day rule under section 859b, and there was a finding of "good cause" for the continuance, there is no bar preventing further prosecution for the same offense. (§ 1387, subd. (c)(1).) "Pursuant to section 1387, 'if the previous termination was pursuant to Section 859b . . . , the subsequent order terminating an action *is not a bar to prosecution* if: [¶] (1) Good cause is shown why the preliminary examination was not held within 60 days from the date of arraignment or plea.'" (*Ramos, supra,* 146 at pp. 732, italics added.)

"Section 1387, subdivision (c)(1), thus necessarily recognizes that a felony complaint will be dismissed pursuant to section 859b if the preliminary hearing is not

held within 60 days of the arraignment even though good cause existed for setting the preliminary hearing beyond the 60-day limit. Recognizing both the mandatory nature of section 859b's 60-day rule and its potential harshness, section 1387 limits the impact of the mandatory dismissal by providing *a good-cause finding prevents a section 859b dismissal from operating as a bar to further prosecution*." (*Ramos, supra,* 146 Cal.App.4th at p. 732, italics added.)

5. Analysis

In this case, because the trial court found good cause to continue Jackson's preliminary hearing beyond the 60-day period under section 859b, the second dismissal "does not count" as one of the two dismissals under section 1387. (See Simons, Cal. Preliminary Examinations and 995 Benchbook: Statutes and Notes (2018 ed.) § 4.4.4, italics added ["Even with good cause, the prosecutor cannot obtain a continuance of the preliminary examination beyond the 60-day rule . . . . . However, where good cause existed, such a dismissal *does not count* under § 1387(c)(1)"].)

Jackson argues that there "was not good cause to continue the preliminary hearing . . . beyond the 60 day limit." We disagree. Section 1387 does not define "good cause," but such a finding plainly lies within the discretion of the trial court. (*People v. Sutton* (2010) 48 Cal.4th 533, 551-552 [court acted within its discretion in finding that appointed defense counsel's engagement in another trial was good cause supporting continuance].)

Here, Jackson's counsel told the court that he was engaged in another trial, which would ordinarily constitute good cause for a continuance. (*People v. Johnson* (1980) 26 Cal.3d 557, 570 ["unavailability of counsel or witnesses constitutes good cause to avoid dismissal"].) Therefore, we find that the trial court did not abuse its discretion.

Jackson also argues that the court erred by not allowing him to represent himself on April 24, 2015 (the day when the court found good cause to continue the

preliminary hearing based on the unavailability of counsel). Again, we disagree. A defendant has the right to represent himself if his request is timely. (*Faretta*, *supra*, 422 U.S. at p. 807.) The decision as to whether a request is timely is left to the discretion of the court. (*People v. Windham* (1977) 19 Cal.3d 121, 128.) Generally, to be deemed timely, a *Farretta* motion should be brought within a reasonable time prior to the hearing. (See *People v. Burton* (1989) 48 Cal.3d 843, 852.)

Here, after Jackson's counsel asked the court to continue the preliminary hearing, Jackson immediately objected and said: "I would like to exercise my *Farretta* rights." The court overruled the motion without stating its reasons. But given that the request was made just prior to when the hearing was about to begin, we presume that the court concluded the motion was untimely. (See *People v. Glaser* (1995) 11 Cal.4th 354, 362, italics added ["We defer to the trial court's factual findings, express *or implied*, where supported by substantial evidence"].) Again, we find no abuse of discretion.

Finally, Jackson argues that the good cause exception "only applies when the *first* dismissal was pursuant to section 859b." Jackson contends that because the *second* dismissal was pursuant to section 859b, the "good cause" exception under section 1387, subdivision (c), does not apply. We disagree. Section 1387 "is sometimes loosely described as establishing a two-dismissal rule, but by its terms requires two orders 'terminating an action.'" (*People v. Superior Court* (*Martinez*) (1993) 19 Cal.App.4th 738, 744.) The statute provides that "if the previous termination was pursuant to Section 859b . . . , the *subsequent order terminating an action* is not a bar to prosecution if: [¶] (1) Good cause is shown why the preliminary examination was not held within 60 days . . . ." (§ 1387, subd. (c)(1).)

Here, there is no dispute that the prosecution filed three separate cases within the same continuing "action." (§ 1387, subd. (c)(1).) But the only "previous termination" at issue is the second case. The trial court terminated the second case "pursuant to section 859b" and *the order that terminated* the action was "not a bar to

prosecution" (in the third case) because there was good cause to continue the preliminary hearing. (See § 1387, subd. (c)(1); *Ramos*, *supra*, 146 Cal.App.4th at p. 732 ["a proper finding of good cause to continue . . . would have precluded use of the mandatory dismissal as a prior termination under section 1387"].)

B. Marsden Hearing

Jackson contends that the trial court prejudicially erred "by failing to hold a *Marsden* hearing" based on his "request to have a new counsel appointed." (Original capitalization and boldfacing omitted.) We agree.

1. Jackson's Request for a Marsden Hearing

On August 15, 2016, the superior court marked as "filed" a handwritten, two-page letter from Jackson. The letter was addressed to: "Richard M. King, [¶] Judge of the Superior Court."[7] The letter was captioned: "RE: Request for Marsden Hearing/Call For attorney conflict."

Within the body of the letter, Jackson stated that: "The relationship between my current attorney Mr. Eady, and I, is irreconcilable." Jackson stated that: "Mr. Eady, has repeatedly lied to me — continuously informing me about Filing the new Writ to the Court of Appeals, but has failed to do so." After further allegations concerning Mr. Eady, Jackson stated: "As to the conflict, I believe there is one." Jackson concluded: "At this time, I'm letting the Court know there is a conflict, and I would like to have a new attorney appointed by the Court through the proper procedure as soon as possible."

[7] Several judicial officers presided over various hearings over the course of the litigation, including the Honorable Judge Richard M. King, who had presided over Jackson's arraignment in the instant case and other routine pretrial hearings.

On August 18, 2016, according to the superior court's docket, the Honorable Judge Sheila F. Hanson presided over a hearing. The parties did not appear and there was no court reporter present. The court stated in a minute order that it had "read and considered [Jackson's] Correspondence filed 8/15/16." The court stated: "Defendant's correspondence is an ex parte communication, which the court will not entertain." The minute order states that copies of the order had been mailed to Jackson, his attorney, Mr. Eady, and a prosecutor.

On September 7, 2016, the matter returned for a pretrial conference. Jackson was present, as was Mr. Eady, and a prosecutor. Judge Hanson presided over the hearing, which apparently was for the purpose of scheduling. During the hearing, Mr. Eady stated as an aside: "I do need to put on the record that Mr. Jackson is very, very, very interested in a writ proceeding that I've been working on. I have promised him that I would have that writ in a state ready to be filed by the 14th." The court ordered Jackson to return for the next hearing. Jackson replied: "Thank you, your honor."[8]

2. Legal Principles

A trial court cannot deny a request to substitute appointed counsel without giving the defendant an opportunity to state his reasons for the request. (*Marsden*, *supra*, 2 Cal.3d 118.) In *Marsden*, the defendant was on trial for forgery. (*Id*. at p. 120.) In chambers, the defendant told the court, "'I don't know how to go about making the motion, Your Honor, but I don't feel that I am being competently or adequately represented by counsel.'" The court told the defendant that "'the comment has been

[8] After the jury verdicts, Jackson made another request to replace Mr. Eady (prior to a court trial on the alleged prior convictions and sentencing). On August 25, 2017, the Honorable Judge Steven D. Bromberg, conducted a *Marsden* hearing. However, that posttrial *Marsden* hearing has no bearing on our analysis as to whether an error occurred before the jury trial began. As such, we deny the Attorney General's pending application for a sealed copy of the reporter's transcript of the posttrial *Marsden* hearing.

made for the court so it's noted, it's on the record.'" (*Ibid*.) The following day, the defendant again raised concerns regarding his counsel and asked the court: "'Could I bring up some specific instances?'" The court said, "'I don't want you to say anything that might prejudice you . . .'" and eventually denied the motion. (*Id*. at p. 122.) On appeal, the defendant argued "that it was error to deny his motion without an opportunity for explanation." (*Id*. at p. 124.) The California Supreme Court agreed. (*Id*. at p. 126.)

The Court reasoned: "A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom." (*Marsden, supra,* 2 Cal.3d at p. 123.) The Attorney General argued "there was no need to hear the defendant's examples of misconduct because he had limited the scope of his motion to the record before the court." (*Id*. at p. 124.) The Court disagreed, noting that "such deduction disregards the defendant's lay status and his admitted ignorance of the law. . . . The semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right." (*Ibid*.)

The Court continued: "Finally, we reach the question whether the error in the trial court was prejudicial to defendant." (*Marsden, supra,* 2 Cal.3d at p. 126.) "There can be no doubt it was. On this record we cannot ascertain that defendant had a meritorious claim, *but that is not the test*. Because the defendant *might have* catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge's denial of the motion without giving defendant an opportunity to do so denied him a fair trial. We cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction." (*Ibid*., italics added.)

Following *Marsden*, trial courts have a duty to conduct a hearing when a criminal defendant seeks to replace his or her appointed counsel. (*People v. Sanchez* (2011) 53 Cal.4th 80, 87.) "[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant *in some manner* moves to discharge his current counsel." (*People v. Lucky* (1988) 45 Cal.3d 259, 281 & fn. 8, italics added ["We do not necessarily require a proper and formal legal motion, but at least some clear indication by defendant that he wants a substitute attorney"].)

"'"[A] *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement."'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.) The trial court ordinarily excludes the prosecutor from the *Marsden* hearing to maintain the attorney-client privilege. (*People v. Madrid* (1985) 168 Cal.App.3d 14, 19.) The court is then required to appoint new counsel if the defendant demonstrates that the failure to do so would substantially impair his constitutional right to effective assistance of counsel. (*Id*. at pp. 16-17.)

On appeal, a trial court's failure to conduct a *Marsden* hearing ordinarily constitutes prejudicial error because the nature of the error (the absence of reasons) necessarily precludes meaningful review of its prejudicial effect. (*People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069.) However, instead of reversing the judgment, an appellate court may remand the case for a postjudgment *Marsden* hearing. (See *People v. Minor* (1980) 104 Cal.App.3d 194, 200.) "The court shall *redetermine* the application for new counsel in the light of [*Marsden*]. If the court determines that good cause for appointment of new counsel has been shown, the court shall appoint new counsel and set the case for retrial. If the court determines that good cause has not been shown, it shall reinstate the order appealed from or take other lawful proceedings to give effect to the verdicts heretofore returned." (*Ibid*., italics added.)

3. Analysis

Jackson wrote a letter to the trial court and captioned it as a request for a *Marsden* hearing. Within the body of the letter, Jackson unequivocally asked "to have a new attorney appointed by the Court through the proper procedure as soon as possible." The court's written response that it would "not entertain" Jackson's request because it was included in an "ex parte communication" did not comport with its duty under *Marsden*. Jackson made a clear "request" for the substitution of his appointed attorney "in some manner." (See *People v. Lucky*, *supra*, 45 Cal.3d at p. 281 & fn. 8.) Further, because the court did not conduct an inquiry into the reasons underlying Jackson's request, we cannot determine the prejudicial impact of the error. That is, we cannot make a determination beyond a reasonable doubt that the error was harmless. (See also *Chapman v. California* (1967) 386 U.S. 18.)

Thus, we conditionally reverse Jackson's convictions. "The court shall redetermine the application for new counsel in the light of [*Marsden*]. If the court determines that good cause for appointment of new counsel has been shown, the court shall appoint new counsel and set the case for retrial." (See *People v. Minor*, *supra*, 104 Cal.App.3d at p. 200.) On the other hand: "If the court determines that good cause has not been shown," the convictions shall be reinstated and the court shall resentence Jackson consistent with this opinion's rulings concerning sentencing. (See also *Ibid*.)

The Attorney General cites *People v. Jones* (2012) 210 Cal.App.4th 355, 361 (*Jones*), for the proposition that "when a trial court inadvertently fails to hold a *Marsden* hearing and the defendant fails to bring such oversight to the court's attention, the defendant abandons his or her *Marsden* claim." In *Jones*, the defendant filed a written *Marsden* motion and the trial court said it would hear the motion two weeks later, but it never conducted the hearing. On appeal, the *Jones* court held that the defendant abandoned his *Marsden* claim because he never again brought the matter to the attention

of the trial court: "the defendant failed to renew his motion when invited to do so." (*Id*. at pp. 360-362.)

Here, the trial court "read and considered" Jackson's letter and then refused to "entertain" his request for a new attorney. Unlike the situation in *Jones*, the court did not "inadvertently" fail to hold a hearing; Jackson had no reasonable awareness that he needed to renew his motion. Further, although there was arguably nothing preventing Jackson renewing his *Marsden* motion, placing such a duty on a criminal defendant under these circumstances would effectively ignore his "lay status" and his presumed lack of knowledge regarding the law. (See *Marsden*, *supra*, 2 Cal.3d at p. 124.)

The Attorney General also argues that the "main issue raised in" Jackson's letter, was his concern regarding Mr. Eady's alleged failure to file a writ. At the next hearing Mr. Eady informed the court that he had been working on the writ and that he had promised Jackson "that I would have that writ in a state ready to be filed by [September 14, 2016]."[9] The Attorney General presumes that because Jackson did not raise the writ issue again at that hearing, Jackson "clearly abandoned the *Marsden* claim set forth in his letter." While that presumption may be true, Jackson also stated in his letter that there was a "conflict" and that Mr. Eady had "*repeatedly* lied to me." (Italics added.) Again, because the court did not conduct an inquiry, we cannot presume that the pending writ was the only issue that Jackson was concerned with. (See *Marsden*, *supra*, 2 Cal.3d at p. 124 ["The semantics employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right"].)

Finally, the Attorney General argues in the alternative that if the trial court erred in failing to conduct a *Marsden* hearing, then the error was not prejudicial. But we cannot gauge the prejudicial impact of the error. In Jackson's letter he stated that his attorney had repeatedly lied to him, there was a "conflict" of some sort, and the

[9] On November 10, 2016, Mr. Eady filed a writ of habeas corpus in this court regarding the "two dismissal" issue, which was summarily denied (G054249).

relationship was "irreconcilable." Without hearing Jackson's underlying reasons we cannot engage in any meaningful review. (See *People v. Solorzano*, *supra*, 126 Cal.App.4th at p. 1069.) That is, we are not convinced beyond a reasonable doubt "that the error did not contribute to defendant's conviction[s]." (See also *People v. Chavez* (1980) 26 Cal.3d 334, 349.)

C. Prior Out-of-State Convictions

Jackson pleaded nolo contendre to three counts of robbery while carrying a deadly weapon and one count of attempted carjacking in two separate Florida cases. The court found the Florida crimes to be "serious felonies" and imposed a consecutive five-year sentence enhancements (40 years in total). Jackson argues that the Florida "offenses do not qualify as serious felonies under California law." (Original capitalization and boldfacing omitted.) We agree as to the three robbery crimes. We disagree as to the one attempted carjacking crime.

1. Legal Principles

"Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of *any offense committed in another jurisdiction which includes all of the elements of any serious felony*, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." (§ 667, subd. (a)(1), italics added.)

"For criminal sentencing purposes . . . the term 'serious felony' is a term of art." (*People v. Warner* (2006) 39 Cal.4th 548, 552.) "Whether a crime qualifies as a serious felony is determined by section 1192.7, subdivision (c), which lists and describes dozens of qualifying crimes . . . . 'Under our sentencing laws, foreign convictions may qualify as serious felonies . . . if they satisfy certain conditions. For a prior felony

conviction from another jurisdiction to support a serious-felony sentence enhancement, the out-of-state crime must "include[] all of the elements of any serious felony" in California. (§ 667, subd. (a)(1).)'" (*People v. Navarette* (2016) 4 Cal.App.5th 829, 842.)

To make a determination regarding a foreign conviction, courts generally apply the "least adjudicated elements" test. (*People v. Myers* (1993) 5 Cal.4th 1193, 1199-1200.) Formerly, the trial court was permitted to consider the entire record of the proceedings to determine whether the prior offense "involved conduct which satisfies all of the elements of the comparable California serious felony offense." (*Id*. at p. 1195.) But the California Supreme Court has recently limited the scope of that review. (*People v. Gallardo* (2017) 4 Cal.5th 120, 126.) Now, a court's role is "limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Id*. at p. 136.)

When a "prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, *the evidence is thus insufficient*, and the People have failed in their burden." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066, italics added.)

2. Analysis: Robbery While Carrying a Deadly Weapon

In California, a robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) In California, a robbery further requires the "specific intent to *permanently* deprive" the victim of his or her personal property. (*People v. Young* (2005) 34 Cal.4th 1149, 1176-1177, italics added.)

In Florida, a robbery is defined as the "taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently *or temporarily* deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." (Fla. Stat. § 812.13(1), italics added; see *Thermidor v. State* (Fla.Stat.Ct. App. 2014) 146 So.3d 95, 97, italics added ["Theoretically, [a Florida] jury could find that the slapping of the cell phone from the victim's hand . . . technically constituted a taking under the theory that it *temporarily* deprived the victim of her property"].)

Here, because of the different intents required under the California and Florida statutes, a defendant can commit a robbery in Florida in such a way that it would not constitute a robbery in California (with the intent to *temporarily* deprive the victim of his or her money or other property). Further, the record of the convictions did not establish a factual basis for the plea. Therefore, there was insufficient evidence to prove that Jackson's three Florida robbery while carrying a deadly weapon convictions qualify as serious felonies under California law.

The Attorney General recognizes the different intents under the statutes, but argues that Jackson's Florida convictions for robbery while *carrying* a deadly weapon qualify as serious felonies because in California a serious felony also includes "any felony in which the defendant personally *used* a dangerous or deadly weapon." (§ 1192.7, subd. (c)(23), italics added.) But again, there is a difference between the *carrying* of a deadly weapon (Florida) and the *use* of a deadly weapon (California).

In Florida, "the statutory element which enhances punishment for armed robbery is not the *use* of the deadly weapon, but the mere fact that a deadly weapon was *carried* by the perpetrator. The victim may never even be aware that a robber is armed, so long as the perpetrator has the weapon in his possession during the offense." (*State v. Baker* (Fla. 1984) 452 So.2d 927, 929.) Conversely in California, the "use" of a deadly weapon occurs only if a person displays the weapon in a menacing manner, hits someone

with the weapon, or fires the weapon. (See CALCRIM No. 3145.) Therefore, the "deadly weapon" aspect of Jackson's Florida robbery convictions do not provide sufficient evidence that the crimes qualify as "serious felonies" under California law.

Finally, the Attorney General argues that Jackson's Florida robbery "convictions would also qualify as serious felonies because they are punishable by up to life in prison. Under section 1192.7, subdivision (c)(7), a serious felony includes 'any felony punishable by death or imprisonment in the state prison for life.'" But the Attorney General conspicuously cites no case law in support of this notion.

Indeed, the "serious felony" sentencing enhancement statute provides that: "Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of *any offense committed in another jurisdiction which includes all of the elements of any serious felony*, shall receive . . . a five-year enhancement . . . ." (§ 667, subd. (a)(1), italics added.)

The statute refers to the "the elements" of "any offense" committed in out-of-state (or foreign) jurisdictions. The statute makes no reference to the myriad of possible sentences other jurisdictions may impose. Hence, the possibility of a life sentence for an out-of-state conviction is irrelevant. Jackson correctly points out that if the Attorney General's interpretation were true, then absurd results would follow. That is, a Draconian life sentence for a relatively minor crime in another country could then theoretically be alleged as a "serious felony" in California.

In sum, the trial court's true findings regarding Jackson's three Florida robberies while carrying a deadly weapon convictions are reversed. There is insufficient evidence that they qualify as serious felonies in California because the relevant Florida statutes do not include "all of the elements" of a robbery—or any other "serious felony"—as those crimes are defined under California law.

The Attorney General argues that if this "court finds insufficient evidence to support the enhancements . . . , the court should remand for retrial and resentencing."

We agree. The reversal of a true finding on a prior conviction for insufficient evidence does not forestall a retrial on that enhancement. (See *People v. Barragan* (2004) 32 Cal.4th 236, 241.) However, as discussed, there will be limitations regarding the admissible scope of the record of the prior conviction. (See also *People v. Gallardo*, *supra*, 4 Cal.5th at p. 136.)

The Attorney General is also correct that the trial court may reconsider the totality of its earlier discretionary sentencing choices on remand (e.g., the striking of Jackson's prison and "strike" priors). "'When a case is remanded for resentencing . . . , the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices.'" (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256, 1258 ["subject only to the limitation that the aggregate prison term [cannot] be increased"].)

3. Analysis: Attempted Carjacking

In California, a carjacking "is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently *or temporarily* deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, italics added.) In California, an attempt requires a specific intent to commit the underlying crime and "'a direct but ineffectual act done towards its commission.'" (See *People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

In Florida, a carjacking is "the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, with intent to either permanently *or temporarily* deprive the person or the owner of the motor vehicle, when in the course of the taking there is the use of force, violence, assault, or putting in fear." (Fla. Stat. § 812.133(1).) In Florida, an attempt requires: "1) a specific intent to commit

the crime; and 2) a separate overt, ineffectual act done toward its commission . . . ." (*Hutchinson v. State* (Fla.Dist.Ct.App. 1975) 315 So.2d 546, 548.)

The California and Florida statutes concerning what constitutes an attempted crime are the same, as Jackson concedes. Therefore, the crime of attempted carjacking in Florida constitutes a "serious felony" under California law if the Florida carjacking statute includes all of the elements of the California carjacking statute. (§§ 1192.7, subd. (c)(27) [a "serious felony" includes "carjacking"], 1192.7, subd. (c)(39) [a "serious felony" includes "any attempt to commit a crime listed in this subdivision other than an assault"].) After reviewing the two statutes, we find that the Florida carjacking statute includes all of the elements of the California statute.

Jackson argues that there is a material distinction between the two statutes. Jackson points out that the Florida carjacking statute requires the vehicle to be taken from the "person *or custody*" of the victim, while the California statute requires that the vehicle be taken from the "person *or immediate presence*" of the victim. But this minor linguistic distinction is immaterial. In Florida, "'property is taken from the person or custody of another if it is sufficiently under the victim's control so that the victim could have prevented the taking had [he] not been subjected to the violence or intimidation by the robber.'" (*Ridgeway v. State* (Fla.Dist.Ct.App. 2013) 128 So.3d 935, 938.) In California, property is within a victim's "'immediate presence'" if it """is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."""" (See *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221.) It is readily apparent that the Florida definition of "custody" essentially mirrors the California definition of "immediate presence."

After reviewing the two statutes, we find that the crime of attempted carjacking in Florida cannot be committed in such a way that it would not constitute the crime of attempted carjacking in California. Thus, we find sufficient evidence to sustain the trial court's findings as to Jackson's prior Florida attempted carjacking conviction.

D. Retroactive Application of Legislative Change

As discussed, the trial court imposed consecutive sentencing enhancements based on Jackson's prior serious felony convictions for the Florida crimes. (§ 667, subd. (a)(1).) In compliance with subdivision (b) of Section 1385, "[a]ny person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive . . . a five-year enhancement for each such prior conviction . . . . The terms of the present offense and each enhancement shall run consecutively." (§ 667, subd. (a)(1).)

Prior to January 1, 2019, a trial court's sentencing discretion regarding prior serious felony convictions was severely restricted: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).) However, the Legislature recently amended the statute. (Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019.) The statute now provides: "If the court has the authority . . . to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice . . . ." (§ 1385, subd. (b)(1).)

Jackson argues that the amended version of section 1385, subdivision (b)(1), applies retroactively because his case is not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740.) The Attorney General concedes the issue and we agree; therefore, the trial court is directed to exercise its sentencing discretion on remand.

III

DISPOSITION

The jury's guilty verdicts are conditionally reversed. On remand, we direct the trial court to conduct a *Marsden* hearing. If the court decides it would have granted Jackson's request to replace his appointed attorney, then the court is directed to do so and the case is to be set for a retrial. But if the court decides it would not have appointed a new attorney, then the jury's guilty verdicts are to be reinstated.

The trial court's findings as to the three alleged prior serious felony convictions for the Florida robbery while carrying a deadly weapon convictions are reversed. Upon retrial and/or resentencing, the court may fully exercise its sentencing discretion as discussed in greater detail within the discussion section of this opinion.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.